STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND COUNTY and OAKLAND COUNTY SHERIFF'S OFFICE, Plaintiffs-Appellants, v OAKLAND COUNTY DEPUTY SHERIFF'S ASSOCIATION, Defendant-Appellee.	UNPUBLISHED August 9, 2011 No. 297022 Oakland Circuit Court LC No. 2009-100777-CD

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiffs Oakland County and Oakland County Sheriff's Office appeal following the circuit court's grant of summary disposition to defendant. We affirm.

I

Plaintiff Oakland County Sheriff's office gave notice that it intended to terminate Ted Goldstein, a deputy sheriff and a member of defendant Oakland County Deputy Sheriff's Association (OCDSA), who had been accused of misconduct at work. Thereafter, the employer, Oakland County Sheriff's Office, held a *Loudermill*[1] due process hearing, and based on the hearing, terminated Goldstein's employment. Goldstein and the OCDSA were parties to a collective-bargaining agreement (CBA).

After the OCDSA disputed the discharge, the matter was ultimately submitted to arbitration. The arbitrator found that the most serious allegations of misconduct were false, and he concluded that the employer did not have just cause to terminate Goldstein's employment. The arbitrator ordered that the grievant "be reinstated forthwith, with no loss of seniority and that his health insurance and benefits be reinstated forthwith." However, the arbitrator ordered that the grievant was not to receive back pay or back benefits.

[1] *Cleveland Bd of Ed v Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985).

Deputy Goldstein was reinstated, but he was not credited seniority for purposes of retirement. After discussion between both parties and an inability to resolve the issue, both parties agreed to submit the dispute about whether the grievant was able to receive pension-service credits to the arbitrator for clarification.

The arbitrator indicated that when he wrote "no loss of seniority," he meant that Deputy Goldstein would be entitled to pension-service credits for that period. Plaintiffs thereafter filed a complaint seeking to vacate the portion of the award granting retirement seniority. Following cross-motions for summary disposition, the circuit court granted defendant's motion for summary disposition on its counter claim to enforce the award and denied plaintiffs' motion for summary disposition.

II

Plaintiffs first contend that the trial court erred in granting defendant's motion for summary disposition because the arbitrator's decision was against the clear and unambiguous language of the CBA and because the arbitrator fashioned his own remedy which exceeded his power. We disagree and affirm the trial court's decision.

An appellate court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.* Furthermore, a court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004).

On motion of a party, a court may vacate an arbitration award if the arbitrator exceeded his or her power. MCR 3.602(J)(2)(c). However, judicial review of an award is narrowly circumscribed, and the inquiry is "whether the award was beyond the contractual authority of the arbitrator." *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). Therefore, an arbitrator's error must be so egregious or obvious that it materially affects the outcome of the arbitration, clearly establishes a disregard for fairness principles, or unequivocally creates a legally invalid result. *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 430; 331 NW2d 418 (1982). However, even if a court is convinced that the arbitrator committed a serious error, the court should not overturn the decision if the arbitrator is arguably construing or applying the contract. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989), quoting *United Paperworkers Int'l Union, AFL-CIO v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987).

When interpreting a contract, an arbitrator must adhere to the plain language of the contract. *City of Pontiac v Pontiac Police Supervisors Ass'n*, 181 Mich App 632, 635; 450 NW2d 20 (1989). "An award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id*. In reviewing a collective-bargaining agreement, an arbitrator may not "dispense his own brand of 'industrial justice.'" *Id*.

Under the express language of the CBA at issue in this case, all grievances, if not handled informally or through a shift committee, "may be submitted to final and binding arbitration." According to the CBA,

> [t]he arbitrator may interpret and apply the provisions of this Agreement to determine the grievance before the arbitrator. However, the arbitrator shall have no power or authority, in any way, to alter, modify, amend, or add to any provisions of this Agreement, or set a wage rate. The arbitrator shall be bound by the express provisions of this Agreement.

Plaintiffs specifically contend that the arbitrator went beyond the express language of the contract to award pension-service benefits to the deputy. Plaintiffs point to the Oakland County Employees Retirement System Restated Resolution, and the section that provides that a member must "render service" to the county at least ten days in a calendar month for the month to be credited as a month of service under the Resolution:

> Service rendered by a member shall be credited to the member's individual credited service account in accordance with rules the Retirement Commission shall prescribe …. In no case shall:
>
> … less than ten days of service in a calendar month be credited as a month of service.

Plaintiffs contend that the trial court erred in finding that the arbitrator had the authority to grant the pension-service credits because the grievant had not worked at least ten days during the month and that any remedy giving pension-service credits was against the express language of the CBA as stated above.

Unless there is express language in the CBA indicating otherwise, an arbitrator may fashion a remedy which considers the fault of the party. *Michigan Ass'n of Police*, 177 Mich App at 760-762. Absent clear language, an arbitrator can modify, even lessen, a sanction or award imposed on a party. *Monroe Co Sheriff v Fraternal Order of Police, Lodge 113*, 136 Mich App 709, 718-720; 357 NW2d 744 (1984).

Here, while the arbitrator was limited by the express provision of the CBA, nothing in the CBA indicates that the arbitrator could not institute pension-service credits. The arbitrator specifically found that plaintiffs did not have just cause to terminate Deputy Goldstein. Based on that conclusion, the arbitrator ordered that Deputy Goldstein be reinstated immediately, with health and other benefits reinstated as well. After a dispute of what "with no loss of seniority" meant, the arbitrator clarified and stated that Deputy Goldstein was to receive pension-service credits for the time that he was unable to work.

Plaintiffs contend that the trial court fashioned a remedy that was not within the four corners of the document. However, an award is legitimate if it draws from the essence of the contract. *City of Pontiac*, 181 Mich App at 635. Here, the trial court clearly found that the award was within the essence of the collective-bargaining agreement:

> The arbitrator's award draws its essence from the collective bargaining agreement, because the collective bargaining agreement makes termination a matter of collective bargaining without otherwise restricting the powers of the arbitrator. Accordingly, the award of the arbitrator will be confirmed.

Because the circuit court properly recognized the limited scope of judicial review in arbitration cases and determined that the award was within the essence of the CBA, plaintiffs have failed to establish that a genuine issue of material fact exists.

III

Plaintiffs next contend that the trial court incorrectly granted defendant's motion for summary disposition because the arbitrator's subsequent modification of the original award can in no way be considered a clarification, and under the doctrine of *functus officio*, the arbitrator had no power or authority to even revisit the original award to modify or change it. We disagree.

An appellate court reviews de novo a trial court's decision on a motion for summary disposition. *Collins*, 468 Mich at 631. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Corley*, 470 Mich at 278. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.* Furthermore, a court reviews de novo a trial court's decision to enforce, vacate, or modify an arbitration award. *Bayati*, 264 Mich App at 597-598.

Michigan recognizes the doctrine of *functus officio* which means that an arbitrator, after making and publishing a final award, cannot change or modify the award. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996).

However, it is unnecessary to consider the doctrine of *functus officio* here. After discussion between both parties and an inability to resolve the issue, both parties agreed to submit the dispute about whether the grievant was able to receive pension-service credits to the arbitrator for clarification. The arbitrator specifically stated that his answer was not a modification of his award; it was explicitly a clarification. Because the arbitrator was only clarifying upon request of the parties, the doctrine of *functus officio*, which applies to modifications or changes of the award, is not applicable.

Because the doctrine of *functus officio* is not applicable and because the arbitrator clarified the award at the parties' request, no genuine issue of material fact exists as to whether the arbitrator had the power to revisit the award.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering